

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of	)	
Protecting the Privacy of Customers of Broadband	)	WC Docket No. 16-106
and Other Telecommunications Services	)	
	)	

**REPLY COMMENTS OF MOBILE FUTURE**

Mobile Future submits these reply comments in response to the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1</sup>

The record demonstrates unanimity in stakeholders’ commitment to consumer privacy, but scant support for the overly prescriptive rules the Commission proposes in the NPRM. The proposed rules would deviate substantially from the Federal Trade Commission’s (“FTC”) existing approach to consumer privacy and the White House’s privacy framework by apply differing privacy protections for consumer information depending on the entity using the data, rather than the sensitivity of the data itself. Arbitrarily applying rules to just one segment of the Internet ecosystem is not supported by the record and would result in unnecessary consumer confusion. The Commission should abandon its flawed “go-it-alone” privacy proposals and instead move toward harmonizing its privacy regulations with the FTC’s existing regime, as set forth in the Consensus Privacy Framework.<sup>2</sup> Alternatively, the Commission should initiate a

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<sup>1</sup> *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016) (“NPRM”).

<sup>2</sup> Letter from American Cable Association, Competitive Carriers Association, CTIA, National Cable & Telecommunications Association, and USTelecom to Chairman Tom Wheeler, Federal

multistakeholder process that would engage the FCC, FTC, NTIA, and all stakeholders to ensure that consistent, flexible rules apply across the Internet ecosystem.

**I. COMMENTERS OVERWHELMINGLY URGE THE COMMISSION TO CHANGE COURSE**

**A. The Commission Should Not Adopt Rules that Deviate from the FTC’s Successful Approach to Protecting Consumer Privacy**

The vast majority of commenters, including the FTC staff itself as well as current and former officials, raise significant questions about a privacy regime centered on the entity that holds consumer data rather than the sensitivity of such data. Before suggesting changes to the proposed rules, the FTC Bureau of Consumer Protection staff observes that the FCC’s proposed rules “would impose a number of specific requirements on [broadband providers] that would not generally apply to other services that collect and use significant amounts of consumer data” and concludes that “[t]his outcome is not optimal.”<sup>3</sup> FTC Commissioner Maureen Ohlhausen expressed support for the FTC staff’s comments but wrote separately to “emphasize the differences between the FTC’s approach and the proposed FCC approach ... and to warn that the FCC’s approach may not best serve consumers’ interests.”<sup>4</sup> Former FTC Chairman Jon Leibowitz notes that in contrast, an “FCC rulemaking consistent with the FTC’s privacy framework would ensure that privacy enforcement remains technology neutral, based on the type of data being collected and how it is used, rather than turning on the type of entity collecting the

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Communications Commission (Mar. 1, 2016) (“Consensus Privacy Framework”), <https://www.ncta.com/sites/prod/files/Letter-PrivacyPrinciples-3-1-16.pdf>.

<sup>3</sup> Comments of Federal Trade Commission, Bureau of Consumer Protection Staff, WC Docket No. 16-106 at 8 (filed May 27, 2016).

<sup>4</sup> Comments of FTC Commissioner Maureen K. Ohlhausen, WC Docket No. 16-106, at 1 (filed May 27, 2016).

data.”<sup>5</sup> However, Leibowitz concludes that the NPRM proposes “regulations for broadband providers that go well beyond those imposed upon the rest of the Internet economy and which, if adopted, would undercut the benefits to the very consumers it seeks to protect.” Professor Christopher Yoo of the University of Pennsylvania also supports this notion, explaining that a failure to harmonize the rules will create an artificial market distortion that could potentially impact technical design or conflict with what is best for consumers.<sup>6</sup>

There is no valid technical, economic, legal, or public interest justification for applying more stringent rules to the same consumer information when it is collected by broadband providers as opposed to when collected by other members of the Internet ecosystem.<sup>7</sup> As Professor Yoo notes, “mobile broadband is increasingly relying on encryption” and “users are making broader use of HTTPS and other forms of security in both browsers and in mobile apps.” Therefore, while ISPs would not be able to see any content in many cases, “[e]dge providers, in contrast, have ready access to the complete content of all the data regardless of the level of encryption.”<sup>8</sup>

Commenters who suggest that broadband providers should be subject to heightened regulations because of high switching costs ignore the current realities of the hyper-competitive efforts among mobile broadband providers to attract new customers, and the fact that in many cases it may be more difficult for a consumer to switch edge providers, such as e-mail providers,

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<sup>5</sup> Comments of Jon Leibowitz, WC Docket No. 16-106 at 2 (filed May 23, 2016).

<sup>6</sup> Comments of Professor Christopher S. Yoo, University of Pennsylvania, Center for Technology, Innovation and Competition, WC Docket No. 16-106 at 5 (filed May 27, 2016).

<sup>7</sup> Comments of Mobile Future at 5-6.

<sup>8</sup> Comments of Professor Christopher S. Yoo, University of Pennsylvania, Center for Technology, Innovation and Competition, WC Docket No. 16-106 at 4 (filed May 27, 2016).

than to switch mobile broadband providers.<sup>9</sup> Further, the ability for mobile consumers to readily port their telephone number from one provider to another has long made switching providers easy for consumers. In contrast, a consumer who wishes to switch e-mail providers faces a difficult choice about whether to give up an e-mail address that may be well known to her contacts and provides access to an archive of years or even a decade or more of communications.

**B. Applying More Stringent Rules to Internet Service Providers Than to Other Market Participants Will Harm Consumers**

Commenters agree that applying new and different rules to one subset of the complex Internet ecosystem while other participants in the ecosystem remain subject to the FTC's existing regime will create consumer confusion.<sup>10</sup> The Multicultural Media, Telecom and Internet Council ("MMTC") explains that the proposed rules "would fragment the design of privacy policy across the Internet ecosystem, leaving consumers reliant upon inconsistent sector-specific regulation" and urges the Commission to "avoid actions that increase variability and contribute to complexity."<sup>11</sup> The five major National Diverse Chambers of Commerce in the United States warn that treating broadband providers differently than other Internet companies will foster "an immense amount of confusion."<sup>12</sup> Former FTC Chairman Jon Leibowitz advises that a "truly

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<sup>9</sup> For example, Verizon, AT&T, and Sprint are all offering similar deals to pay customers up to \$650 to switch to their networks. David Goldman, "Verizon will give you up to \$650 to switch," CNN Money (Dec. 30, 2015), available at <http://money.cnn.com/2015/12/29/technology/verizon-switch/>; Switch to AT&T, available at <https://www.att.com/shop/wireless/switch-and-save-etf.html> (last visited June 19, 2016); Switch to Sprint, available at <https://promo.sprint.com/Registration/DisplayLanding?LandingPartial=CBOLanding> (last visited June 19, 2016).

<sup>10</sup> Comments of Mobile Future, WC Docket No. 16-106 at 7 (filed May 27, 2016).

<sup>11</sup> Comments of the Multicultural Media, Telecom and Internet Council, WC Docket No. 16-106 at 6 (filed May 27, 2016).

<sup>12</sup> Comments of the United States Hispanic Chamber of Commerce, U.S. Black Chambers, Inc., Asian/Pacific Islanders American Chamber of Commerce & Entrepreneurship, National Gay &

consistent approach [to privacy] is vital for the continued growth and economic benefits of the Internet, and serves to avoid consumer confusion and misunderstanding regarding the uses of their data.”<sup>13</sup> The National Organization of Black Elected Women points out that the NPRM “asks far too much of consumers who will be confused and exhausted by the prospect of learning different privacy rules for all the different places they go online.”<sup>14</sup> The Organization also notes that while NPRM contemplates that “consumers must be empowered to be stewards of their own privacy,” it simultaneously “threatens to bury them in confusing and inconsistent information instead of streamlining and simplifying their choices.”<sup>15</sup>

Commenters also warn of the high cost of complying with the proposed rules. The Competitive Carriers Association explains that the proposed rules would be “too costly for small providers to implement,”<sup>16</sup> citing the increased costs of complying with the proposed opt-in regime and data security requirements. The State Privacy and Security Coalition notes that the overbroad proposed data breach notification requirements would impose significant and unnecessary costs.<sup>17</sup> The Voice on the Net Coalition highlights the impact significant

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Lesbian Chamber of Commerce, and U.S. Mexico Chamber of Commerce, WC Docket No. 16-106 at 1 (filed May 27, 2016).

<sup>13</sup> Jon Leibowitz Comments at 3.

<sup>14</sup> Comments of the National Organization of Black Elected Women, WC Docket No. 16-106 at 2 (filed May 27, 2016).

<sup>15</sup> *Id.*

<sup>16</sup> Comments of the Competitive Carriers Association, WC Docket No. 16-106, at 4, 26, 40 (filed May 27, 2016).

<sup>17</sup> Comments of the State Privacy and Security Coalition, WC Docket No. 16-106, at 4-5 (filed May 27, 2016).

administrative costs would have on smaller providers as well as the additional burden of potential liability for the data security practices of third-party partners.<sup>18</sup>

### **C. Consumers Should Remain Free to Voluntarily Share Information**

The record also reflects agreement that the Commission should not adopt short-sighted rules that deprive consumers of the choice to voluntarily share personal information in exchange for benefits.<sup>19</sup> Former FTC Chairman Leibowitz explains that the NPRM’s proposal to ban consumers from voluntarily sharing information in exchange for lower priced services “departs fundamentally from FTC guidance and undermines the core principle of customer notice and choice” and that “consumers should be able to choose for themselves how to value privacy.”<sup>20</sup> MMTC further explains that “financial inducement programs that require informed consent should not be seen as presumptively coercive, *i.e.*, consumers should have sufficient information provided to understand the benefits of such services and make their choices.”<sup>21</sup> Instead of prohibiting such consumer-friendly offerings, the Commission should “provide guidance as to the privacy protection components that an acceptable program would include.”<sup>22</sup> Price is sometimes the most important factor for consumers, and the Commission should not remove consumer choice here anymore than it should insist that everyone must have a specific type of smartphone.

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<sup>18</sup> Comments of Voice of the Net Coalition, WC Docket No. 16-106, at 4-5 (filed May 27, 2016).

<sup>19</sup> Mobile Future Comments at 7; Comments of FTC Commissioner Maureen Ohlhausen, WC Docket No. 16-106, at 3 (filed May 27, 2016); Comments of Adtran, Inc., WC Docket No. 16-106, at 13 (filed May 27, 2016); Comments of CenturyLink, WC Docket No. 16-106, at 29 (filed May 27, 2016); Comments of Cincinnati Bell Telephone Company, WC Docket No. 16-106, at 10 (filed May 27, 2016); MMTC Comments at 8-9; Comments of NTCA – The Rural Broadband Association, WC Docket No. 16-106, at 7-12 (filed May 27, 2016).

<sup>20</sup> Comments of Jon Leibowitz at 9.

<sup>21</sup> MMTC Comments at 8.

<sup>22</sup> *Id.*

## **II. THE COMMISSION SHOULD ABANDON ITS FLAWED PROPOSALS IN FAVOR OF HARMONIZING ITS PRIVACY REGULATIONS WITH THE FTC’S EXISTING APPROACH**

The Commission should abandon the overbroad and overly-restrictive proposals in the NPRM and harmonize its privacy regulations with the FTC’s existing notice-and-choice approach to consumer privacy. Specifically, the Commission should adopt the Consensus Privacy Framework, which focuses on transparency, respect for context and consumer choice, data security, and data breach notification and provides for strong enforcement for unfair or deceptive acts or practices that materially harm consumers, consistent with the FTC’s framework. There is overwhelming support in the record for harmonizing the FCC’s privacy regulations with the FTC regime.<sup>23</sup> In the alternative, the Commission should initiate a multistakeholder process to engage all stakeholders, including the FTC and NTIA, to ensure that consistent and common sense rules apply across the Internet ecosystem.

## **III. CONCLUSION**

In today’s rapidly growing Internet economy, American consumers and stakeholders alike deserve a uniform, effective, and coordinated policy approach to privacy as exemplified by the FTC’s current framework. The FCC should abandon the proposed consumer privacy

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<sup>23</sup> See, e.g., Comments of the American Cable Association, WC Docket No. 16-106, at 39-41 (filed May 27, 2016); Comments of the Association of National Advertisers, WC Docket No. 16-106, at 16, 20 (filed May 27, 2016); Comments of CALinnovates, WC Docket No. 16-106, at 4-5 (filed May 27, 2016); Comments of Christopher Yoo, WC Docket No. 16-106, at 2, 6-7 (filed May 27, 2016); Comments of Citizens Against Government Waste, WC Docket No. 16-106, at 6-7 (filed May 27, 2016); Comments of the Communications Workers of America, WC Docket No. 16-106, at 4 (filed May 27, 2016); CCA Comments at 5-6; Comments of the Consumer Technology Association, WC Docket No. 16-106, at 12 (filed May 27, 2016); Comments of Consumers’ Research, WC Docket No. 16-106, at 2, 11 (filed May 27, 2016); Comments of the Electronic Transactions Association, WC Docket No. 16-106, at 1 (filed May 27, 2016); Comments of Free State Foundation, WC Docket No. 16-106, at 11 (filed May 27, 2016); Comments of FreedomWorks Foundation, WC Docket No. 16-106, at 1 (filed May 27, 2016); Comments of ITIF, WC Docket No. 16-106, at 16 (filed May 27, 2016).

regulations in the NPRM in favor of an approach that ensures simplicity, transparency, and consistency for consumers and is in harmony with the way the rest of the Internet ecosystem approaches consumer privacy under the FTC's regime. The Commission should adopt the Consensus Privacy Framework or, in the alternative, initiate a multistakeholder process that would ensure that consistent rules apply based on the type of data collected and how it is used rather than simply the entity that is collecting it.

Respectfully submitted,

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